Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

October Term, 1998

JEROME BERG,

Petitioner,

vs.

COURT OF APPEAL CALIFORNIA OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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App. 1

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEROME BERG,	)	
Plaintiff,	)	No C-96-3473 SI
v.	)	ORDER TO SHOW
	)	CAUSE;
CALIFORNIA COURT	)	PARTIAL DISMISSAL
OF APPEAL,	)	
et al.,	)	
Defendants.	)	

The present action arises out of plaintiff Jerome Berg's divorce litigation in Marin County Superior Court. Mr. Berg filed the present civil rights complaint pursuant to 42 U.S.C. § 1983 alleging, inter alia, that the California Court of Appeal deprived him of his constitutional right to due process by dismissing one of his appeals as "frivolous" and imposing sanctions. Mr. Berg seeks an order from this Court "declaring the sanction procedure of the California Court of Appeal in this case

unconstitutional, voiding the sanction orders, and enjoining enforcement thereof." First Amended Compl. at pp. 5-6.

On October 8, 1996, this Court issued an Order to Show Cause why the action should not be dismissed on the ground that it is barred by the Eleventh Amendment. Mr. Berg filed a timely response to the Order to Show Cause. Thereafter, Mr. Berg filed a First Amended Complaint, which adds two additional defendants, Joanna Leighton (plaintiff's ex-wife), and Charles Kline Moore (Ms. Leighton's attorney of record in the state court proceedings).

DISCUSSION

1. Claims Against California Court of Appeal

Mr. Berg argues that this action ought to proceed against the California Court of Appeal in federal court relying upon the exception articulated in Ex Parte Young, 209 U.S. 123 (1908), for actions challenging the constitutionality of a state official's acts. Under the Ex Parte Young exception, suits against state officials to enjoin them from enforcing unconstitutional state laws are not considered suits against the state. Thus, they are

not barred by the Eleventh Amendment. The rationale for this exception is that by violating individuals' constitutional rights, officials are stripped of their official capacity; they may therefore be sued for the unconstitutional consequences of their conduct. Id. at 160. Mr. Berg improperly relies upon the Ex Parte Young exception in the present case. There are no state officials named in the complaint; the named defendants are the California Court of Appeal, plaintiff's former spouse and her attorney. Although amendment of the complaint might cure this defect, the Court must nevertheless dismiss the California Court of Appeal without leave to amend for lack of subject matter jurisdiction on a different ground.

The present action asks this Court to interfere with -an ongoing state case. The United States Supreme Court has exclusive jurisdiction to review state court judgments for federal constitutional errors. Federal courts are not permitted to engage in what is essentially appellate review of state court judgments. See Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-86 (1983). This rule, known as the "Rooker-

Feldman" rule, applies to both state court determinations of federal questions and constitutional claims that are "inexplicably intertwined" with state court judgments. See Dubinka v. Judges of Sup. Ct., 23 F.3d 218, 221-22 (9th Cir. 1994). District courts may consider general constitutional challenges to state law but not a state court's application of that law to a particular case. Id. at 221.

That is precisely what Mr. Berg seeks to accomplish in the present action. He contends that his constitutional rights were violated by the California Court of Appeals' application of state law to his case. His action is an impermissible collateral attack on a state court decision. See Branson v. Nott, 62 F.3d 287, 29192 (9th Cir. 1995). From a review of the complaint in this matter, it is clear that Mr. Berg is not mounting a general constitutional challenge to a particular state law; rather, he seeks to review the merits of the California Court of Appeal decision. Id. at 292 (citation omitted). This Court is accordingly without jurisdiction to hear Mr. Berg's section 1983 claims against the California Court of Appeal, both on Eleventh Amendment grounds, and as a result of the Rooker-Feldman

doctrine.

2. Claims Against New Defendants

In his First Amended Complaint, Mr. Berg adds two private individuals, Ms. Leighton and Mr. Moore. Nowhere in the first Amended Complaint does Mr. Berg offer any explanation of how these private individuals acted under color of state law sufficient for them to be sued under section 1983. Private citizens do not act under color of state law, an essential element of a section 1983 claim. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Accordingly, plaintiff is hereby further ordered to show cause in writing-within ten days from the date of this Order why his claims against these newly added defendants should not be dismissed for failure to state a claim upon which relief may be granted.

CONCLUSION

For the foregoing reasons and for good cause shown, defendant California Court of Appeal is hereby DISMISSED from this action for lack of subject matter jurisdiction. Mr. Berg

is ordered to show cause within ten days why the remaining defendants should not be dismissed.

IT IS SO ORDERED.

Dated: October 30, 1996 /S/

SUSAN ILLSTON

United States District Judge